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# DISCUSSION PAPER

## Brexit: the launch of Article 50

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*"Every time we say goodbye, I die a little.  
Every time we say goodbye, I wonder why a little."*  
Cole Porter

Well, we know what has happened so far. In June 2015 the House of Commons, at the behest of Prime Minister David Cameron, voted by 544 votes to 53 to hold a referendum on withdrawal from the European Union. In the subsequent referendum on 23 June 2016, 52% voted to leave the EU. Mr Cameron left in disgrace. In December MPs voted by 461 to 89 to support Prime Minister Theresa May's decision to invoke Article 50 by the end of March 2017. Following the intervention of the UK Supreme Court, the government was obliged to bring forward parliamentary legislation in order to empower Mrs May to proceed as planned. Accordingly, the Commons voted on 1 February by 498 to 114 for the critical second reading of the bill.

### **The emasculation of the Westminster Parliament**

One assumes that the bill will pass through all its parliamentary stages in both Houses in time for the prime minister to inform the European Council at its meeting on 9-10 March that she is at last invoking Article 50. Several Westminster parliamentarians have talked about amending the bill so as to lay down conditions on the parliamentary process and to stipulate some red lines on the content of the Brexit negotiations; but it is unlikely that they will succeed in constraining the government's freedom of action. What becomes clearer by the day is that once Parliament had recourse to the referendum, it effectively emasculated itself. Given the chance, the British people decided to leave the EU; the government has taken them at their word; and Parliament is side-lined.

Some MPs persist in the belief that if they are soft now on the matter of the government's commencement of the Article 50 talks, they can toughen up their stance later as the Brexit process nears its conclusion. This is a dangerous error. For one thing, the Remainers have no settled view amongst themselves about what would be a superior deal to the one outlined by the government. The fact is that if there is to be an Article 50 treaty in a couple of years' time it will be a compromise acceptable to both the UK and the EU. The withdrawal treaty itself will be fairly technical, and its negotiation will have been serious. If an agreement is reached, there will be no mass rejoicing but rather a general relief that a deal has been done at all, that collateral damage is limited and that a new partnership between the UK and the EU can at that stage begin to be engaged.

## No turning back

Failure to conclude an Article 50 treaty would be to cause the EU treaties simply to cease to apply to the UK. Although the House of Commons has the constitutional right to a 'negative' vote that would reject the Article 50 treaty, it cannot by doing so revert to the status quo of continuing Britain's current membership of the EU. The government has now promised MPs a 'positive' vote on the final draft package, but the same rules apply. If Westminster were to reject the draft, the European Parliament will not assent to the treaty.

After the humiliating and costly failures of both Cameron and May, it is fanciful to imagine that the EU institutions and its 27 member states could be persuaded that they should give a third Tory prime minister a chance to attempt yet another renegotiation of Britain's terms of EU membership. Europe's tolerance for British particularism is already at breaking point. The referendum was for real. Article 50 gives both sides two years to conclude their negotiations. If a withdrawal agreement can be reached within the two years, it will be implemented. If it cannot be reached – or if having been reached in Brussels it is rejected at Westminster – Europe says goodbye and Britain slides off the cliff edge.

There has been much speculation among academics and lawyers – even involving current litigation in the Irish courts – about whether Article 50 once invoked could be revoked.<sup>1</sup> None of the co-authors of Article 50 believe that not to be the case: there is nothing in the EU treaties to say otherwise. But whether or not the European Council and the European Parliament would accept a reversal of Brexit is another matter altogether and would depend entirely on the legal and political circumstances prevailing at the time. A change of mind late in the day, or a frivolous meander from the path of negotiation, or an attempt to subvert the triggering of Article 50 by a method known not to be in accordance with the UK's constitutional requirements, would surely be dismissed. The Article 50 two-year timetable can be extended by a unanimous decision of the European Council, and a short extension in order to expedite a proper completion of the negotiations – perhaps to wait for a court judgment – would be manageable. But EU27 will never permit an attempt by a recalcitrant UK to procrastinate, to delay for delay's sake. Nor will they be impressed by the threat of a second referendum on the outcome of the Article 50 negotiation: rather the contrary.

## Pulling the trigger

Working on the assumption that Parliament at Westminster has no more to say on the matter, the European Council on 9 March will register the receipt of Theresa May's notification of her government's intention to withdraw from the Union. In doing so it will evince neither surprise nor regret, having been forewarned first by Mr Cameron on 28 June and then by Mrs May herself at the two subsequent meetings of the European Council in October and December. The heads of government also read the newspapers. They have analysed as best they can the prime minister's speech at Lancaster House (17 January) in which she set out her government's case for Brexit. The speech was supplemented by a white paper published on 2 February.<sup>2</sup>

Her European Council colleagues will wish to quiz the prime minister on a number of points that both her speech and the white paper have left unclear. These points of ambiguity concern:

- the timing and sequencing of the negotiation of the Article 50 withdrawal agreement, on the one hand, and a putative new treaty between the UK and EU27, on the other;
- the nature of the transitional arrangements that will kick in the day Brexit happens and prevail until any new partnership treaty enters into force;
- the kind of customs arrangements the UK seeks once it leaves the EU's current customs union;
- the question of judicial oversight of the future trade and other relationships between the UK and the EU.

By way of a response to the British government's recent statements, the European Council will prepare to issue guidelines as to how it intends the proceedings to unfurl. These guidelines will take the form of a lengthy annex to the conclusions of an extra meeting of the European Council. The date of this extra meeting

of the heads of government is delicate, needing to avoid the Easter weekend (14-17 April), the French presidential elections (23 April-7 May) and the Schuman Day holidays (8-9 May). A possible date for the special meeting of the European Council (also to bid farewell to President Hollande) is 20-21 April.

The guidelines are bound to reiterate the principles first enumerated in the European Council's statement of 29 June 2016.<sup>3</sup> The UK will be welcomed as a prospective "close partner" of the EU; any agreement will be "based on a balance of rights and obligations"; "access to the single market requires the acceptance of all four freedoms". Expect a reference to be made to the hitherto rather neglected Article 8 TEU, which reads:

"1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.

2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation."

Mention will also be made of the modalities of the negotiations, first broached in the conclusions of the European Council meeting of 15 December.<sup>4</sup>

As laid down in Article 218(3) TFEU, the European Council's guidelines will lead the Commission to make recommendations to the General Affairs Council (GAC), which will then take the formal decision to open the negotiations with the UK. That decision will not be taken before there is a new French minister of Europe. (We are now in June.) True to its word, the Council will establish a special committee to monitor the progress of the Article 50 talks, and a representative of a Council working party, chaired by Belgian mandarin Didier Seeuws, will be present at all the meetings between the Commission and the British.

The European Council will review the progress of the negotiations at each of its meetings, issuing revised guidelines as appropriate; and the GAC can be expected to address further operational directives to the Commission from time to time. It will be up to the Commission to propose to the Council that an agreement can be concluded (Article 218(5)). The Council does not need unanimity to decide to approve the agreement but can act, after obtaining the consent of the European Parliament, by a special qualified majority of 20 out of the 27 states. It is not to be excluded that a special body will have to be set up to monitor the application of the agreement, to smooth the operation of the divorce settlement and to settle lingering disputes – for instance, over legacy budgetary issues – for a certain, probably ill-defined transitional period.

For all their interest in the process, the European Council and Council will be right to give Michel Barnier, the Commission's chief negotiator, ample room to negotiate. They will be keen to avoid a situation in which different vested interests of the 27 states are accentuated to an extent that would allow the UK to exploit those differences. In spite of the fact that the solidarity of the EU27 has been impressive to date, London is already suspected of trying to divide and rule. Here the explicit calls for EU solidarity of the current Maltese presidency of the General Affairs Council are impressive – and doubly so because Malta is a faithful member of the Commonwealth, the organisation in which many Brexiteers invest so much faith.<sup>5</sup>

## **Including the European Parliament**

Both Council and Commission will also be keen to manage the participation in the talks of the European Parliament's Brexit negotiator, Guy Verhofstadt. While some member states are keen to limit its involvement, and as Mr Verhofstadt will no doubt observe, the engagement of the European Parliament is essential in at least three important respects:

- the European Parliament has the right under Article 50 to grant or withhold consent to the final Brexit treaty;
- MEPs have the right to be immediately and fully informed at all stages of the procedures (Article 218(10)),

- as supplemented by an inter-institutional agreement between Commission and Parliament and elaborated further by the practical precedent of Parliament's inclusion in other international negotiations;<sup>6</sup>
- Parliament also has the right to dispatch the final agreement to the European Court of Justice in order to verify its compatibility with the EU treaties (Article 218(11)).

In their engagement with the process, MEPs can be expected to evince special interest in the plight of EU citizens left stranded in the UK after Brexit and in the legacy rights of British nationals resident in the EU, as well as in the budgetary settlement. Ancillary but important questions arise about what to do at the next European Parliamentary elections in 2019 with the 73 seats vacated by British MEPs – a question on which the Parliament has the dutiful right of initiative (Article 14(2) TEU).<sup>7</sup>

The European Parliament needs to organise itself in a way that its contribution to the Brexit negotiations is efficient and, where necessary, discreet. It will be aware that its privileged access to the Article 50 exercise is regarded jealously by some national parliaments, especially in Berlin and The Hague but also, ironically, at Westminster. MEPs should be open to hearing the views of the UK's devolved executives and parliamentary assemblies in Belfast, Edinburgh and Cardiff, as well as Gibraltar. The voice of British local government and civil society might also get overlooked at the level of the official negotiations between the EU institutions and the UK government. The quality and scope of the European Parliament's first resolution on Brexit, foreseen even for mid-March, will be closely observed.

### **Mr Barnier's dilemma**

There is already tension between London and Brussels on the matter of the timing and sequencing of the negotiations. As far as the EU is concerned, Mr Barnier's mandate is to disentangle the UK from its rights and obligations as an EU member state. His first job will be to get a methodology for the talks agreed: British theatrics will go down very badly. The topics he has to address are quite straightforward, if complex. They include dismantling the British end of the EU budget; relocating EU agencies out of the UK; providing new arrangements for border crossings (particularly in Ulster); dealing with British personnel in the EU institutions, including pensions; and ensuring the interests of EU citizens resident in the UK.

The timetable is tight: we have noted that the proper negotiations will not start until June 2017, and Mr Barnier has suggested a target of October 2018 for their conclusion in order to give time for the European Parliament to vote its consent, for the Council to reach its decision on the package, and for the UK's own constitutional procedures to be completed, all within the two year deadline.

Undoubtedly, the most difficult issue will be money. The British need to be persuaded to pay all that they owe the EU – but not a penny more. Estimates touted in the press suggest that the UK will owe between EUR 40bn and EUR 60bn. The UK is contracted for the whole of the EU's current multi-annual financial framework (MFF) which lasts for the seven years from 2014. If Britain wishes to opt out of the MFF before time, there will be a penalty to pay. It makes more sense, both financially and administratively, for it to be agreed that the UK should continue within the EU budget in terms both of revenue and expenditure until the end of 2020.

Some significant expenses to which the UK is committed by virtue of its EU membership lie outside the general EU budget: these include the Galileo project and other space activities, certain common security and defence missions as well as its annual contributions to the European Development Fund. There will also need to be an agreement on the disaggregation of assets, such as the UK claim on EU investment in Brussels real estate. But the EU's liabilities are much larger than its assets.

At any rate, the Commission would be wise not to provoke the British with the abrupt presentation of a single long and large invoice, but to prepare to schedule the settlement of accounts over several, perhaps many years. And at the same time the Commission will need to manage the short-term impact of the departure of a large net contributor to the EU budget, a blow which is bound to open up new tensions

between the remaining net contributors and net recipients in the run-up to the negotiation of the next MFF. The UK government has already indicated that in the context of its sought-after 'new partnership' with the EU, it would wish to keep its membership of certain EU agencies, such as Europol: agreeing on the price tag for Britain's shopping list will feature prominently in the later negotiations of Britain's future relationship.

## **Making the transition**

It is clear that there will be two treaties: the first is the Article 50 withdrawal agreement; the second is to settle the long-term relationship, which Mrs May describes as a comprehensive free trade agreement plus political cooperation.

The UK government, however, appears to want a third treaty by way of transition towards the new situation. London prefers a separate, temporary agreement in order to bridge the gap between the actual date of Brexit – say, April Fools' Day 2019 – and the entry into force, possibly some years later, of the new permanent treaty. One problem is that such a transitional treaty would be classed under EU law as a 'mixed agreement' which, unlike the Article 50 withdrawal agreement but just like the final treaty, would require national ratification by all 27 EU states. A transitional treaty would be very difficult to negotiate because it would effectively pre-empt decisions on the final 'new partnership' before the detailed content of the future free trade agreement were known.

As far as the Commission is concerned, transitional measures will certainly be needed to wind down the UK's rights and obligations, sector by sector, according to various but existing legal bases. But in its view this exercise can best be undertaken by EU secondary legislation that will simply adjust the EU's common policies and spending programmes, including the financial regulation, to the EU's new, post-Brexit situation.

## **Mr Davis' 'Great Repeal Bill'**

Such a phasing-out at the EU level should be crafted to coincide with the workings at Westminster of the 'Great Repeal Bill' and the abolition of the European Communities Act 1972 which gave effect to EU law within the UK. Certainly, it is in the interests of both parties to the negotiation to avoid a massive legal black hole for business and public administration at the moment of formal Brexit.

David Davis, the UK Brexit minister, is optimistic that the Great Repeal Bill will allow the UK ample time to sift and fillet what of the corpus of EU law it wishes to keep, amend or ditch. His optimism may be misplaced: the legal effect of EU regulations and directives if orphaned from the executive, legislative and judicial institutions which spawned them will be dubious at best and jeopardised at worst. Once bereft of their parentage, EU laws will lose the primacy they formerly enjoyed. Moreover, much of EU law has cross-border ramifications and is realised by reciprocal obligations in other member states: such reciprocity will no longer apply once the UK leaves the EU. Nor will the EU regulatory framework still pertain in the UK to enforce compliance with the law, leaving Britain the job of creating *de novo* its own bespoke regulatory regime. Liberation from Brussels may prove to be lovely, but Britain is about to rediscover the heavy hand of the Men from the Ministry in Whitehall and the hob-nailed boots of the local constabulary.

## **'New partnership' versus 'special relationship'**

The European Council's guidelines are being written in full cognisance of this early divergence of view between London and Brussels about the nature and purpose of the transitional measures. The EU will have to state categorically that, while there can be informal talks about Britain's future place in Europe in parallel with the start of the Article 50 negotiations, nothing for the future will be agreed by the EU, even in general terms, until such time as the Article 50 talks have progressed to a point where the British are seen to be committed wholeheartedly to their successful conclusion.

Both sides face a challenge in that Article 50(2) prescribes that the agreement with the UK should set out "the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union". Theresa May's speech is a necessary basis for the start of political discussions about the future framework but not a sufficient guarantee of their conclusion. If words are to be agreed by the European Council that define the nature of the EU's new "special relationship" with the UK (Article 8 TEU), the British will have to become much more specific about committing themselves to an institutional connection with their erstwhile partners along the lines of a formal association agreement (Article 217 TFEU). In short, it is not enough for the UK to claim that its harmonisation with the *acquis communautaire* on 1 April 2019 is its passport to a future relationship with the EU: in addition it will need to put in place a new regulatory framework to ensure continued technical equivalence at official level, a ministerial and parliamentary apparatus to facilitate political collaboration, and a form of judicial tribunal to arbitrate disputes.

As things stand, it is difficult to avoid the impression that the British have forgotten that it is they who have decided to leave the EU, and not the other way around. The white paper sets out London's case baldly:

"[W]e want to have reached an agreement about our future partnership by the time the two year Article 50 process has concluded. From that point onwards, we believe a phased process of implementation, in which the UK, the EU institutions and Member States prepare for the new arrangements that will exist between us, will be in our mutual interest. ... For each issue, the time we need to phase in the new arrangements may differ; some might be introduced very quickly, some might take longer. And the interim arrangements we rely upon are likely to be a matter of negotiation. The UK will not, however, seek some form of unlimited transitional status. That would not be good for the UK and nor would it be good for the EU."<sup>8</sup>

In riposte, the European Council guidelines need to be as blunt. Whatever its present frustrations with the British, the EU is obliged by treaty to develop a new 'special relationship' with the UK in a spirit of 'good neighbourliness'. For the EU, which likes to do things in tidy packages, the fact that it has recently designed an Association Agreement with Ukraine, provides a template which could be adapted to suit the British case. This is clearly a more difficult concept for Mrs May, who told her Lancaster House audience that she did not want Britain to be left "half-in, half-out" of the EU, as an associate member. "We do not seek to hold on to bits of membership as we leave", she added. (Although, of course, she does.)

## **Liberation from foreign jurisdiction**

The British government must know that to strike a formal economic and security relationship with the EU requires any third country to respect the EU's constitutional order. Technical engagement between the UK and the EU will be necessary to ensure regulatory equivalence without which free trade is impossible. Political interaction is necessary to maintain effective cooperation in internal and external security matters. While the UK after Brexit will have escaped the jurisdiction of the European Court of Justice, it will not be able to evade its jurisprudence. This last seems to present a particular difficulty for Prime Minister May. She would be wise as soon as possible to demonstrate that she no longer suffers from what one British official calls the 'opt-out-itis' that afflicted her term as Home Secretary. She should drop her evident strongly held antipathy towards the European Court.

We note that the white paper at least recognises that this is an unresolved issue. An annex discusses, albeit superficially, various forms of international trade dispute resolution, including CETA, Switzerland, NAFTA, Mercosur and the WTO – but not EFTA or an EU Association Agreement, thereby scrupulously avoiding the touchy but ultimately unavoidable question of the role of the European Court of Justice. Once the negotiations get going that issue must be confronted squarely.

## **Fond farewell**

We have already argued that the Article 50 negotiations will not and cannot succeed unless the framework of Britain's future relationship becomes more clearly articulated. It is part of the job of Michel Barnier to

nudge the British towards gradually defining the exact location of their country's future landing zone. If the UK makes concessions on the institutional side, an Association Agreement would do the trick. An Association Agreement is not associate membership of the EU.<sup>9</sup> Nor does an Association Agreement presage future re-entry to the Union as a full member state.

The British government's white paper adds very little of substance to the prime minister's earlier speech. It barely conceals the deep uncertainty which lies at the heart of the government's high-risk Brexit strategy. In the prime minister's speech and again in the white paper comes the bold cliché that "no deal for the UK is better than a bad deal for the UK". Yet the swagger is tempered by a sign that the British government is aware of the danger of a breakdown. The white paper warns:

"In any eventuality we will ensure that our economic and other functions can continue, including by passing legislation as necessary to mitigate the effects of failing to reach a deal".<sup>10</sup>

One wonders if any of the Brexit campaigners had envisaged the need for a State of Emergency.

In contrast to the amateurishness of the British, the EU side looks highly professional. The imminent guidelines of the European Council must work hard to install some semblance of dignity into the business of Brexit. The goal must be to expedite the departure of the British without wrecking the rest of Europe.

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*The views expressed in this Discussion Paper are the sole responsibility of the author.*

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- 1 For pithy comment on all this, see Allott, Philip (2017), "Taking Stock of the Legal Fallout from the EU (Notification of Withdrawal) Act 2017", available at <https://ukconstitutionallaw.org/>
  - 2 <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper>. I have written previously about May's speech and European reactions to it for the European Policy Centre and Policy Network, both 24 January.
  - 3 <http://www.consilium.europa.eu/en/policies/eu-uk-after-referendum/>
  - 4 <http://www.consilium.europa.eu/en/press/press-releases/2016/12/15-statement-informal-meeting-27/>
  - 5 Malta is followed in the six-monthly Council presidency by Estonia in July 2017, Bulgaria and Austria in 2018, and Romania and Finland in 2019.
  - 6 See Annex XIII to the European Parliament's Rules of Procedure, available at <http://www.europarl.europa.eu/sipade/rulesleg8/Rulesleg8.EN.pdf>
  - 7 Guy Verhofstadt has suggested that these 73 ex-British places be filled by an election in a pan-European constituency from transnational lists.
  - 8 White Paper, para. 12.2.
  - 9 See my evidence to the House of Lords, December 2016, available at <http://www.parliament.uk/brexit-uk-eu-trade-inquiry>
  - 10 White Paper, para. 12.3.

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